FILE COPY

DEC 9 1946

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946

No. 764

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

REMICK MUSIC CORPORATION,
Respondent.

No. 765

PEONY PARK,
Petitioner,

v.

M. WITMARK & SONS,
Respondent.

No. 766

LLOYD G. FOX,
Petitioner,

v.

CHAPPELL & CO., INC.,
Respondent.

No. 767

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM J. HOTZ,
HOTZ & HOTZ,
1530-5 City Natl. Bank Bldg.
Omaha, Nebraska
Attorneys for Petitioners.

COCKLE PRINTING COMPANY, LAW BRIEFS, OMAHA

INDEX

Subject Index

Page

Jurisdictional Statement 1

Statement of the Case 2

Five Reasons Advanced for the Allowance of the Writ of Certiorari 4

I. Wrongful nullification of a state statute by a federal court 4

II. Erroneous application of Section 1(a) and 1(e) of the National Copyright Act 11

III. Proper application of Section 1(e) of the National Copyright Act; conflict between Second Circuit and Eighth Circuit 21

IV. Eighth Circuit Court's erroneous approval of granting the privilege of retaining control of copyrighted material after sale, in conflict with Second Circuit and decisions of the Supreme Court of the United States 26

V. Eighth Circuit's error in striking down applicable sections of the Nebraska state statute when the same constitutes proper exercise of the state police power 28

Prayer 32

Brief in Support of Petition for Writ of Certiorari 34

Statement of the Points to be Relied upon for Reversal in the Event Certiorari is Allowed 41

SUPPORTING CASES AND STATUTES IN BRIEF

Page

I. 35

Aldich v. Remington Rand, Inc. (D. C. Tex., 1942), 52 F. Supp. 732.

Bobbs-Merrill Pub. Co. v. Straus (1908), 210 U. S. 339, 28 S. Ct. 722.

Isaac H. Caliga v. Inter Ocean Newspaper Co. (1909), 215 U. S. 182, 30 S. Ct. 38.

John Church Co. v. Hilliard (U. S. D. C. N. Y. 1915), 221 F. 229, 136 C. C. A. 639.

John Church Co. v. Hilliard, 242 U. S. 591, 37 S. Ct. 232 (Jan. 1917).

Herbert v. Shanley (U. S. D. C. N. Y. 1915), 222 F. 344.

Herbert v. Shanley (2 C. C. A. 1916), 229 F. 340, 134 C. C. A. 460.

Herbert v. Shanley, 242 U. S. 591, 37 S. Ct. 232 (Jan. 1917).

RCA Mfg. Co. v. Whiteman (2 C. C. A. 1940), 114 F. 2d 86. Certiorari denied.

Straus v. Victor Talking Mach. Co. (1917), 243 U. S. 490, 37 S. Ct. 412.

National Copyright Act (br. apdx. 16-23), March 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088. Sections 1(a), (b), (c), (d), (e); 2; 5; 9; 11; 12; 25; 34; 35; 40.

Rules and Regulations, Registration of Claims to Copyright, 37 Code of Federal Regulations, Ch. II as amended. 17 U. S. C. A., 1945 P. Pts., p. 107, Sec. 201.1; p. 110, Sec. 201.6; p. 110, Sec. 201.7; p. 111, Sec. 201.8; p. 112, Sec. 201.12.

CASES AND STATUTES CITED—Continued

Page

Federal Copyright Acts from 1790 to 1909 and to date. (Taken from *Copyright Enactments of the United States* 1783-1906—and to date. Compiled by Thorwald Salberg, Register of Copyrights; Bulletin No. 3, Second Revised Edition.) Br. apdx. 55.

Committee Report No. 2222 on Bill Enacting Copyright Act of 1909, 60th Congress, Second Session; to Amend and Consolidate the Acts Respecting Copyright. (Entire report found in *The Copyright Law;* Herbert A. Howell, recently Assistant Register of Copyrights; the Bureau of National Affairs, Inc., Washington, D. C., 1942) Br. apdx. 24-32.

II. 36

Hubbell v. Pastime Amusement Co. (U. S. D. C. N. Y. 1917), 242 F. 1002.

Mutual Benefit Health and Accident Assn. v. Bowman (8 C. C. A., 1938), 99 F. 2d 856 (Syl. 3 and 4 and cases cited).

Witmark & Sons v. Pastime Amusement Co. (U. S. D. C. S. C. 1924), 298 F. 470. Section 1e of the Copyright Act quoted at p. 477.

Witmark & Sons v. Pastime Amusement Co., 2 F. 2d 1020.

III. 37

Bobbs Merrill Pub. Co. v. Snellenberg (C. Ct. Pa., 1904), 131 F. 530.

Bobbs-Merrill Pub. Co. v. Straus (1908), 210 U. S. 339, 28 S. Ct. 722.

CASES AND STATUTES CITED—Continued

Page

Davenport-Quigley Expedition v. Century Production Co. (U. S. D. C. N. Y. 1937), 18 F. Supp. 974.

National Geographic v. Classified Geographic (D. C. Mass., 1939), 27 F. Supp. 655.

Patterson v. Ogilvie Pub. Co. (C. Ct. N. Y., 1902), 119 F. 451.

RCA Mfg. Co. v. Whiteman, 114 F. 2d 86. Certiorari denied.

Stevens v. Cady (R. I.), 14 How. 528, 14 L. Ed. 528.

Stevens v. Gadding, 17 How. 477, 15 L. Ed. 155.

Straus v. American Publishers Assn. (1913), 231 U. S. 222, 34 S. Ct. 84.

Univis Lens Co. v. U. S. (1942), 316 U. S. 241, 62 S. Ct. 1088.

Title 17 U. S. C. A., Sec. 41, 35 Stat. 1084 (br. apdx. 16).

Committee Report No. 2222 on Bill Enacting the Copyright Act of 1909. Section 41 (br. apdx. 32).

IV. 38

Allen v. Riley (1906), 203 U. S. 347, 27 S. Ct. 95, and cases therein cited.

Buck v. Gallagher (D. C. Wash., 1940, before Haney, C. J., Bowen and Black, D. J.), 36 F. Supp. 405.

Buck v. Gibbs (D. C. Fla., 1940, before Hutcheson, C. J., Long and Barker, D. J.), 34 F. Supp. 510.

CASES AND STATUTES CITED—Continued

Page

Buck v. Swanson (D. C. Neb., 1939, before Gardner, C. J., Munger and Donohoe, D. J. Findings of fact and conclusions of law not reported; copied in br. apdx. with opinion, pp. 42-52), 33 F. Supp. 377.

Marsh v. Buck (May 27, 1941), 313 U. S. 406, 61 S. Ct. 969.

Paramount Pictures v. Langer, (U. S. D. C. N. D. 1938, before Sanborn and Thomas, C. J., Sullivan, D. J., and cases therein cited), 23 F. Supp. 890.

Straus v. American Publishers Assn. (1913), 231 U. S. 222, 34 S. Ct. 84.

Watson v. Buck (May 27, 1941; concurrently decided with *Marsh v. Buck* as basic opinion), 313 U. S. 387, 61 S. Ct. 962.

Nebraska Act (br. apdx. 1-15).

Nebraska Cases

V. 39

Bridgeport I. D. v. U. S. (8 C. C. A., 1930), 40 F. 2d 827.

Howell v. State (1909), 83 Neb. 448, 120 N. W. 139.

Johnson v. J. H. Yost Lumber Co. (1941), 117 F. 2d 53.

Marsh-Burke v. Yost (1915), 98 Neb. 523, 153 N. W. 573.

State v. Adams Lumber Co. (1908), 81 Neb. 392, 116 N. W. 302.

CASES AND STATUTES CITED—Continued

Page

State v. American Surety Co. (1912), 91 Neb. 22, 135 N. W. 365.

State v. Nebraska Distilling Co. (1890), 29 Neb. 700, 26 N. W. 155.

State v. Omaha Elevator Co. (1906), 75 Neb. 637, 655, 106 N. W. 979, 110 N. W. 874.

State v. Standard Oil Co. (1900), 61 Neb. 28, 84 N. W. 413.

Younglaus v. Omaha Film Board of Trade (1932), 60 F. 2d 538.

Nebraska Statutes relating to monopolies, unfair practices, boycotting, etc. (R. S. N. 1943, Ch. 59).

Federal Court Cases

American Press Assn. v. U. S. (1945), 326 U. S. 1, 65 S. Ct. 1416.

Eastern New York Savings Bank v. Hahn (1946), ... U. S. ....., 66 S. Ct. 69.

Fashion Originators Guild v. F. T. C. (1941), 312 U. S. 457, 61 S. Ct. 703.

Fox Film Corp. v. Doyal (1932), 286 U. S. 123, 52 S. Ct. 546.

General Electric v. Hygrade Sylvania Corp. (U. S. D. C. N. Y. 1942), 45 F. Supp. 714.

Interstate Circuit, Inc. v. U. S. (1939), 306 U. S. 208, 59 S. Ct. 467.

CASES AND STATUTES CITED—Continued

Page

Morton Salt Co. v. Suppiger (1942), 314 U. S. 488, 62 S. Ct. 402.

Paramount Famous Lasky, et al. v. U. S. (1930), 282 U. S. 30, 51 S. Ct. 42.

U. S. v. First National Pictures (1930), 282 U. S. 44, 51 S. Ct. 45.

30 C. J. S., Maxims, Sec. 89, p. 458—Public Policy.

VI. 40

Title 17 U. S. C. A., Sec. 25 Fourth (br. apdx. 21-2).

Title 17 U. S. C. A., Sec. 40 (br. apdx. 23).

Congressional Committee Report No. 2222 (br. apdx. 32).

Supreme Court of the United States

OCTOBER TERM, 1946

No. .....

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

REMICK MUSIC CORPORATION,
Respondent.

No. .....

PEONY PARK,
Petitioner,

v.

M. WITMARK & SONS,
Respondent.

No. .....

LLOYD G. FOX,
Petitioner,

v.

CHAPPELL & CO., INC.,
Respondent.

No. .....

INTERSTATE HOTEL COMPANY OF NEBRASKA,
Petitioner,

v.

JEROME KERN AND T. B. HARMS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

JURISDICTIONAL STATEMENT

Judicial Code, Sec. 240a as amended, being Sec. 347a, Title 28 U. S. C. A., and Supreme Court Rule 38 form

the statutory ground and court rule for granting or denying this writ of certiorari.

STATEMENT OF THE CASE

1. Specific statement of facts, law, and reasons advanced by the petitioners for allowance of the writ, with proper reference to the record and decisions, will follow after this brief statement of the nature of the case.

2. These cases involve infringement suits, brought by the respondents, music publishing houses, as proprietors of the copyrights on certain popular musical compositions, for unlicensed singing and playing thereof, not for copying, vending, plagiarizing, or similar violations. The defendants below and now petitioners for this writ are establishments who engaged musicians who had bought the composition, to play and sing such music on the premises of petitioners and elsewhere. The federal trial court in Omaha held that the infringements alleged had taken place. Some eleven cases, involving seventeen counts, were brought at one time by respondents against petitioners and other similar establishments in Nebraska. The trial court held that the National Copyright Act had been violated by the petitioners and rendered judgments for damages against the respective petitioners in favor of the respective respondents in each case separately. One of the petitioners' defenses raised by answer was the protection of a state statute passed by the legislature of the State of Nebraska in 1937, especially one portion of the statute which applied to all music publishers including respondents. That portion of the state act was

a state regulatory measure. It required all publishers of musical compositions to collect their license fees, for the right to sing and play the music, at the time the reproduced copies were offered for sale by music stores and elsewhere and sold to musicians and the public generally throughout Nebraska. The sales were made from retail stores in Nebraska that had bought the sheet music and orchestrations from respondents as publishers. The pertinent section was held by the United States District Court in these infringement suits as no defense because unconstitutional and not applicable to respondents, and the sections of the state statute applicable to respondents were thus nullified by a federal trial judge.

3. Also the petitioners plead as another defense that Section 1e of the National Copyright Act gave neither the respondents nor any other copyright proprietor any statutory right to further contribution after a copyrighted musical composition of the class involved in these cases had been reproduced in copy form for sale and sold to the public, as was done in the instances set forth in these cases. This point was raised for the first time since the enactment of the Copyright Act in 1909. The point was likewise decided adversely to the petitioners by the United States District Court at Omaha, and held no defense to the infringement suits.

4. The United States Circuit Court of Appeals for the Eighth Circuit affirmed the District Court on its ruling on all points of defense, and affirmed the judgments. There were no disputes on the facts concerning the ownership of the copyright and the renditions as alleged in the complaints as filed.

5. It will be shown, as hereinafter more definitely pointed out by specific references to the records and citations, that important questions of national concern are involved; that conflicts exist between circuit courts on important issues hereinafter set forth; that the letter and the plain purpose of the National Copyright Act in its application throughout the entire United States have been erroneously construed by the Eighth Circuit in each of these cases.

6. The cases were consolidated for trial and for hearing on appeal by agreement of parties. The legal questions involved are the same in all cases. Accordingly all four cases are similarly consolidated in this petition for writ of certiorari.

FIVE REASONS ADVANCED FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

I.

1. The petitioners request that writ of certiorari issue to the United States Circuit Court of Appeals for the Eighth Circuit in order that the final opinion and judgments rendered therein on October 23, 1946 (U. S. C. C. A. Record, p. 313, submitted herewith), may be reviewed by the United States Supreme Court, and upon hearing that decision be reversed and the causes dismissed. The said Eighth Circuit opinion was rendered by and the hearing heard before Gardner, Woodrough, and Riddick, circuit judges, affirming the decision and judgments of the United States District Court for the District of Nebraska, Omaha Division (U. S. C. C. A. Record, p.

48, submitted herewith). In these above-captioned consolidated cases the decision and judgments were rendered by the Honorable John W. Delehant, the federal trial judge, on December 9, 1944 (58 F. Supp. 523). The record from the Eighth Circuit will be referred to hereinafter as "R. ____." Appended to petitioners' brief filed in the Circuit Court of Appeals, where petitioners herein were appellants, is an appendix containing important statutes and other official documents necessary for ready reference in the consideration of this petition for writ of certiorari. That brief and appendix are submitted likewise with the record from below, and will be referred to herein as "br. apdx. ____." These statutes and documents referred to in the appendix to the brief are:

(a) A Nebraska state legislative bill prohibiting monopolies by any person or persons dealing in public performance rights on musical compositions, even though such composition may have been copyrighted under the National Copyright Act. Within that state act was also a regulatory section requiring all music publishers, acting free from concerted action, to collect their prices for public performance for profit at the time the reproduced copies are sold to the public in Nebraska, and thus free the musician-purchaser, and those engaging him from liability for copyright infringement—when and if a copyrighted song thus purchased in Nebraska at a music store, for example, is sung or played in public for profit in Nebraska. (Br. apdx. 1-15. Revised Statutes of Nebraska 1943, Sec. 59-1303.)

(b) All sections of the National Copyright Act here in question. (Br. apdx. 16-23. 17 U. S. C. A. Secs. 1,

2, 5, 11, 12, 25(b) Fourth, and 41; 1945 pocket supplement to 17 U. S. C. A., Rules and regulations for the registration of claims to copyright, Secs. 201.1-201.25 of Title 37 of the Code of Federal Regulations.)

(c) Congressional Report No. 2222 (1908-09) submitting for enactment to Congress the present National Copyright Act which became a law on March 4, 1909 (br. apdx. 24-32).

(d) A description of all copyright laws passed by Congress from 1793 to date, with reference to the statutes at large and where found (br. apdx. 55).

(e) The opinion, findings of fact, conclusions of law, and decree in a previous case wherein the same Nebraska state act (br. apdx. 1-15) was declared totally unconstitutional by a three-judge federal court in Nebraska on December 28, 1939. The opinion was rendered and the hearing had before said statutory court consisting of the aforesaid Eighth Circuit Judge Archibald K. Gardner, presiding, and District Judges Munger (now deceased) and Donohoe of Nebraska. The said previous opinion given in 1939 is reported in *Buck v. Swanson,* 33 F. Supp. 377, and the unreported findings, conclusions, and decree are set forth in the appendix to the petitioners' brief in the United States Circuit Court of Appeals (br. apdx. 33-52). By direct appeal to the United States Supreme Court the aforesaid three-judge decision nullifying the said Nebraska state statute was reversed and the case dismissed by the United States Supreme Court on May 27, 1941. The opinion is *Marsh v. Buck,* 313 U. S. 406. A companion case from Florida (*Watson v. Buck,* 313 U. S. 387) was decided at the same time. The opin-

ion was delivered by Justice Black and concurred in by all members of the Court except Justice Murphy, who was not sitting. The United States Supreme Court in those cases held as valid the Nebraska statute above cited prohibiting persons and firms having a monopoly in the subject matter of public performance for profit on copyrighted musical compositions from doing business in the state. In reference to the regulatory provision applicable to music publishing houses and the respondents herein, the United States Supreme Court refused to declare the same invalid. The three-judge court declared the section invalid. The High Court did state it would meet particular problems that might grow out of the enforcement of the act, preferably after the highest state court had passed upon the same. The state court has not done so; it could not, as an infringement suit is of federal jurisdiction, and the regulatory measure applicable to respondents was a defensive matter in an infringement suit in the federal court.

2. It appears to petitioners that the United States Supreme Court has already, to the extent of that section as well as the monopoly section, declared itself on the validity. Petitioners so claim, based upon the foregoing references to the sections of the act and the citations to the cases construing them.

3. The record will show that after the judgments were rendered in the cases at bar by the trial court and while a motion for new trial was pending, the legislature of the State of Nebraska repealed the Nebraska statute. The trial court's decision in the cases at bar nullifying the protective section (br. apdx. 4-5, Sec. 2A and B)

opened the way for an avalanche of additional infringement suits against Nebraska users including petitioners which would have been confiscatory of their respective businesses (R. 87-9). Accordingly the state legislature repealed the act, effective in August 1945, long after the cases were concluded in the trial court.

4. Respondents' amended petition (R. 8-9) filed with the trial court stated that the respondents did not attempt to comply with the sections of the Nebraska statute (Sec. 2A and B) because they did not sell or offer for sale the musical compositions in question in the state, and said sections were violative of the state Constitution as well as the federal Constitution and Section 1e of the National Copyright Act. The nullification of the sections of the state act above referred to resulted in a boycott by respondents against the State of Nebraska on all commercially usable music. The respondents' organization ASCAP had been prohibited from doing business within the state because it was an unlawful monopoly, as declared by the Supreme Court of the United States on May 27, 1941, in 313 U. S. 406. In 1942 and 1943 a number of actions were filed by the respondents, of which the cases at bar are a part. With the judgments rendered against the petitioners in the amount of $250.00 for each rendition and $150.00 attorney fees (R. 82), as a matter of mathematical deduction and general knowledge, it is obvious that an establishment using music might readily be subjected to damages from a respondent music publisher in an amount equal to twenty times $250.00 or $5,000.00 plus attorney fees in one evening. Even more than twenty musical numbers are frequently

played from one music publisher's catalog.

5. The question of the effect of the repeal of the Nebraska statute was not raised by the respondents in the United States Circuit Court of Appeals. That court, however, on its own motion treated the matter as if the repeal question had been raised and as if that court had been asked to take the repeal into consideration in its decision. At R. 328 the Circuit Court of Appeals stated in its opinion as follows:

> "* * * 'A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law.'" (Citing the standard cases in an attempt to sustain that view.)

As a bare statement of the common law the statement is correct. It has no application to the State of Nebraska and the repeal by the legislature of Nebraska of the statute for the following reasons:

6. In 1913 Nebraska passed a statute preserving the existing rights of parties in pending actions, after repeal. This law was in force and effect at all times mentioned herein and governs the law in regard to repeal.

> R. S. N. 1943, Sec. 49-301—"Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

7. Prior to 1913 the repeal of a statute might have been construed in accordance with the statement in the Circuit Court's opinion but not after 1913. In *Kleckner v. Turk,* 45 Neb. 176, 63 N. W. 469, decided in 1895, the Nebraska Supreme Court stated:

> "As a general rule, the repeal of a statute which confers the right to an action, the remedy provided existing solely by and through such statute, or the repeal of a penal statute, abates a suit pending to enforce the remedy provided or destroys any right of action which has accrued thereunder; but in states where a general saving clause has been enacted it enters into such repeal and renders it conditional, or inoperative upon the law, inasmuch as it might affect accrued rights of action or pending suits."

8. After the passage of the statute the Supreme Court of the State of Nebraska in 1935 in *Helfrich v. Baxter,* 128 Neb. 281, 258 N. W. 532, stated:

> "Section 20-2141, Comp. St. 1929, as amended by chapter 41, Laws 1933, taking away the power of the court to enter deficiency judgments in equity actions, is not applicable to a suit pending at the time it went into effect by virtue of the general saving clause act, section 49-301, Comp. St. 1929."

The last citation in the quotation is the Nebraska saving clause statute above set forth.

9. With no opportunity before the United States Circuit Court of Appeals given the petitioners to explain this important matter to that court and in view of the fact that the repeal of the law of the State of Nebraska applicable to the respondents in reference to public performance rights affects every music user and musician in the State of Nebraska, it would seem that on this point the Court should allow certiorari. When the pertinent section of the Nebraska act was declared unconstitutional and nullified by a single federal judge and when the United States Circuit Judge who had previously nullified the same section and passed upon the question in the

case, petitioners believe this Court should allow certiorari rather than remand the cases on the point.

II.

1. Certiorari should be allowed because the United States Circuit Court of Appeals placed an erroneous construction upon Section 1e of the National Copyright Act (17 U. S. C. A.; br. apdx. 16). For the first time in the history of copyright litigation since the effective date of the act on March 4, 1909, this Court will be called upon to construe the true text of the National Copyright Act, if certiorari is allowed. The language of the true text was changed in two court decisions in United States Courts. All the following annotations appeared under the true text set forth in the official Code and in the United States Code Annotated.

2. It will be shown now that there exists a direct conflict between the Fourth Circuit and the Second Circuit as well as the Eighth Circuit in reference to the interpretation of Section 1 and Section 1e of the National Copyright Act (17 U. S. C. A.; br. apdx. 16).

3. To understand this rather complicated problem it is necessary to relate a short historical story. During the hearings held by Congress in 1908 and 1909 the respondents, through their organization then known as the Music Publishers Protective Association (now ASCAP), beseeched Congress to give them the right to publish and sell throughout the nation copyrighted musical compositions, and at the same time retain to themselves or their assigns the right to sing and play in public for profit

those same songs. The respondents would have had Congress open the gate for monopolistic and unfair practices in the matter of public performance rights for profit. This the congressional committee refused. We call the Court's attention to the comments of the congressional committee in reference to Section 1 (br. apdx. 24-31) and especially in reference to retention of rights and controls pertaining to rendition of music.

4. Congress gave the right of public performance for profit unless the copyrighted musical composition was reproduced in copy form for sale and sold to the public, in which event the right to sing and play it in public for profit went with the purchase price of the sheet music or orchestration. The copyright statute itself, Section 5 (br. apdx. 18) and the rules and regulations of the Register of Copyrights (1945 Cumulative annual pocket part, p. 107) clearly demonstrate the method Congress provided for the protection of the copyright owner if he wished to retain to himself the right to collect licenses or performing rights on copyrighted musical compositions. In the cases at bar it is admitted in the record that nothing but a published copyright provided by statute is here involved.

5. The statute makes particular reference to dramatico-musical compositions (Sec. 1d), for example, in which the right to public performance is protected only if the musical play is *not* reproduced in copy form for sale. Attention is called to the fact that Section 1a changed the common law. By the National Copyright Act the people gave to a copyright proprietor the right to sell

his copyrighted works on the open market and changed the common law by protecting him in such with the exclusive right "to print, reprint, publish, copy, and vend the copyrighted work." None of these things are involved in these actions. Congress in Section 1d gave the proprietor of a dramatic work the right "to perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; * * *."

6. That phraseology becomes important because the Second Circuit drew the distinction between Sections 1e and 1d in a case where there was involved the infringement of a dramatico-musical number so copyrighted under Section 1d and performed in a restaurant at the same time that an ordinary musical composition that had been copyrighted under Section 1e was played and sung therein. The former had not been reproduced in copy form for sale, while the latter had been reproduced in copy form for sale. The court held that there was a violation of the National Copyright Act in connection with the former, but there was not in reference to the latter. These citations will follow after we have called Your Honors' attention to the exact official wording of Section 1e which is applicable to the cases at bar and explains the error committed by the United States Court of Appeals for the Eighth Circuit:

> "(e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof, to make

> any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: * * *"

The subsection (a) referred to protects against others copying and vending the published work.

7. The respondents apparently were not satisfied with that text as passed by Congress, so litigation was started by them resulting in two cases wherein the foregoing official text was changed in the judicial opinions. The Circuit Court erred by setting forth the true text and supporting it with one decision wherein the text was changed. Whether the text was changed by inadvertence or perhaps by an agreement or understanding between the respective counsel, seems just now immaterial.

8. In *Hubbell v. Pastime Amusement Co.* (U. S. D. C. N. Y. 1917), 242 F. 1002 (not appealed), the court inserted a semicolon as urged by the plaintiff in that action (a director in ASCAP then and now) after the words, "musical composition," in the second line of Section 1e of the National Copyright Act. This request was granted by the judge. There was no real contest advanced by the opposition, apparently. The court said in that case:

> "But the controversy goes deeper than a mere matter of pleading, and I am entirely satisfied that a semicolon should precede the words 'and for the purpose of public performance for profit.' "

9. The Circuit Court of Appeals for the Eighth Circuit erred when it failed to recognize the avowed purpose back of this attempt by the respondents to change the law.

It will be seen that the law now reads in accordance with the decision above quoted:

> "(e) To perform the copyrighted work publicly for profit if it be a musical composition; * * *"

This gave one additional absolute right to those given by Section 1a. The semicolon tended to cut off what followed in that paragraph, i. e., that the musical composition might be reproduced in copy form for sale if its purpose was for public performance, but the public performance rights were lost if reproduced and obviously sold to the public. The author would be protected, of course, against printing, reprinting, publishing, copying, and vending the copyrighted work. But it did not give the proprietor the right to collect his public performance rights on copies that were reproduced in copy form for sale and sold to the public. If he wished to retain performance rights, he had two very clear courses to pursue under the statute: (1) He need not reproduce the copyrighted song in copy form for sale; instead, he could make by contract a private arrangement with whom he wished to profit by public performance for profit. (2) He could copyright his song as an unpublished work and deal guardedly with his copyright, as provided in Section 5 of the National Copyright Act and by following the very clear provisions in the regulations found in 17 U. S. C. A. pocket part for 1945. Otherwise he might prefer to sell the music "right and left" in copy form and make his money on royalties and profits on the sale, as was done by respondents herein.

10. In 1924 one of the respondents in the cases at bar, M. Witmark & Sons, obtained a decree in a case that it had instituted in 1921 or 1922 in the United States District Court in South Carolina entitled *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470. At page 477 of the opinion in that case the United States District Court, Honorable Ernest F. Cochran, in rendering his opinion, stated that he was copying the copyright statute from the defendant's brief, along with other matters. The judge said he so copied in order that there could be no doubt about the language. That court was therein passing upon the aforesaid same identical Section 1e of the National Copyright Act. That court's attention was apparently not called to the true text of the National Copyright Act by either the plaintiff's or the defendant's counsel. In the court's opinion in the "deciding part" of the case, the court said:

> "In order that this new view of the question may be clearly understood, I shall state it in counsel's own language which is as follows: * * *"

(The court was referring to the congressional hearing above referred to in reference to the National Copyright Act, and was passing directly upon said Section 1e.) The court then adopted and quoted from the brief before him:

> " 'During the progress of the hearings the words "or any part thereof" were dropped, the words "for profit" were added, and the law emerged in its present form as follows: "That any person entitled thereto * * * shall have the exclusive right * * * to perform the copyrighted work publicly for profit if it be a musical composition." ' "

11. Here, then, by judicial decree the semicolon previously inserted by a court was now changed to a period inserted by a court. Obviously, the National Copyright Act did not emerge in the form as stated.

12. The United States Circuit Court of Appeals in the cases at bar erred when it cited and followed that case from South Carolina as the law for the Eighth Circuit. The South Carolina case was appealed to the United States Circuit Court of Appeals for the Fourth Circuit and affirmed by a memorandum opinion found in 2 F. 2d 1020. In neither the South Carolina District Court nor in the Fourth Circuit Court of Appeals were the questions that are herein raised, submitted to the respective judges of those courts. Consequently, the fault, if one there be, lies with the respondent herein, Witmark, and its associates. They have benefited from 1924 to date by the use of the false text at the rate of about six million dollars per year (33 F. Supp. 377). There were 30,824 licenses enforced after this decision in 1924 up to 1941. There were 65 million public performances for profit annually in the United States according to the record in Marsh v. Buck. Each became an infringement under that decision (Vol. I, p. 198, 203 in record in *Marsh v. Buck*, 313 U. S. 406). Prior to this decision, the president of ASCAP in the last cited case (witness Buck) testified that no licenses were collected.

13. The trial court in the cases at bar rendered an opinion on these two particular above-analyzed cases. On the appeal to the United States Circuit Court of Appeals in the cases at bar, no further comment was made,

excepting to affirm the opinion from the District Court, which reads as follows (R. 26-7):

> " • • • One gathers from the briefs maintaining that position that the alleged miscarriage of judicial thinking is to be attributed to various factors, but principally to the astute, and not always too scrupulous, presentation of the position of the copyright proprietors, especially in the earlier and developmental stages of the decisions; to incompetent representation, and in certain notable instances to appearances pro se in behalf of adversely interested litigants; and, while intimated with gracious and becoming delicacy, to an occasional, though uncomplimentarily frequent, Homeric nod on the part of the federal judiciary upon both a horizontal and a vertical pattern. Industry and ingenuity have developed the argument, but they have not fortified it with conviction. And this court is not persuaded that it should presumptuously attempt to reverse the settled, and, it would seem, understanding and correct construction of the statute involved. The argument of counsel for the defendants upon this point and the authorities cited in its support have been carefully and repeatedly examined by the court in the present study; but the court is unable to assent to its validity."

14. Particular attention is called to this judicial comment because nowhere in the record of the cases will it be found that counsel for the petitioners herein made the slightest intimation of "miscarriage of judicial thinking," nor did the court below in these cases at bar ground his remarks upon any other facts to justify the conclusion above quoted. The New York and South Carolina decisions speak loudly against respondents. Why

the effort to insert first the comma and then the period unless for respondents' desire to have the act construed as if Congress had put the comma or period in the text?

15. Error has been committed, however, by the United States Circuit Court of Appeals for the Eighth Circuit in the cases at bar by not treating the problems before it with a proper analysis of Section 1e. In its opinion it copied for the first time in the history of the copyright litigation on this subject the exact wording of the statute, but the court supported its opinion with the South Carolina decision.

16. Any student of the law would naturally conclude that public performance rights were a plain, distinct right, the same as protection against plagiarism, if the student were given a text that read that the copyright proprietor shall have the exclusive right "to perform the copyrighted work publicly for profit if it be a musical composition." But that is not the law nor is it the text of the copyright statute.

17. Petitioners pray that the writ may be allowed and that petitioners be granted an opportunity to present to this High Court the complete history of national copyright legislation and the decisions of the courts that prompt correction by our judicial branch of the government. To the end that this vast control now exercised by the respondents may be declared as unlawful and in violation of the National Copyright Act as passed by Congress, this writ is requested.

18. Furthermore, in the record before this Court the witness Paine stated, as manager of ASCAP (R.

299), in reference to the enormous number of public performance rights vested in the respondents' organization ASCAP,

> "It would take well over a year to do the thing, and I would never be sure that it would be accurate at that, because of the tremendous number of arrangements and various forms in which a musical work is published."

19. The respondent, Remick Music Corporation, is one of a group of music publishing houses that own the public performance rights on thousands of popular musical compositions. All the capital stock of Remick and all its subsidiaries is owned by the Music Publishers Holding Corporation. The Music Publishers Holding Corporation owns all the capital stock of Edward A. Stagey Co. The last company actually prints and does the mechanical work of reproducing the musical compositions in salable form for almost all publishers. All the capital stock of the Music Publishers Holding Corporation is owned by three men (R. 166-8). The president of each corporation is Herman Starr, an officer and director of ASCAP (R. 209-212).

20. For the other group, being the Chappell & Co., Inc. group, see the testimony of Max Dreyfus (R. 218-220). Max Dreyfus is likewise an officer and director in the ASCAP organization.

21. It is this monopolistic control which Congress and the National Copyright Act denied the respondents, according to the act itself and as confirmed by the report of the congressional committee (br. apdx. 24). Yet

these practices have gone on. No court's attention has been directed to these strange attempts by respondents to change the law until in these cases at bar. The United States Circuit Court of Appeals for the Eighth Circuit would permit the practices to continue in reference to public performance rights even after its attention has been called to the errors. Certiorari should be allowed.

III.

1. The United States Circuit Court of Appeals for the Eighth Circuit again erred when it denied the petitioners' appeal for a decision in accordance with decisions in the Second Circuit. Petitioners believe that the National Copyright Act, Section 1e, was in those decisions properly construed and that those decisions do constitute the law of the land on the subject matter of public performance for profit on musical compositions.

2. In 1915 in the case of *Herbert v. Shanley* (U. S. D. C. N. Y.), 222 F. 344, on appeal 229 F. 340, 134 C. C. A. 460, 2 C. C. A. (1916); and *John Church Co. v. Hilliard* (U. S. D. C. N. Y.), 221 F. 229, on appeal 136 C. C. A. 639, 2 C. C. A. (1916), 228 F. 1021, the District Court (and the Circuit Court on appeal) dealt with two alleged infringements of copyright, one a dramatico-musical play, popularly known as a "comic opera," and another as an ordinary musical composition such as in the cases at bar.

3. The copyright proprietor brought the action in the federal District Court for the Southern District of New York in 1915. The Copyright Act then had been in force and effect since March 4, 1909, and there were

found no cases in the digests for infringement of public performance for profit on copyrighted musical compositions that had been reproduced in copy form for sale and sold to the public. Respondents' organization (ASCAP) decided to try out the question. The District Court held and the Circuit Court affirmed the answer to the question in the following language:

> "However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave unto the public domain all musical rights, except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated.
>
> * * *
>
> "This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright but that is because the plaintiff wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance had been anything beyond the least essentials to a musical reproduction of the copyrighted song, it would be protected; but it was not. The plaintiffs are really trying to eat their cake and have it; they would get the full benefit of a musical copyright while they prevent the public from enjoying the corresponding rights."

4. Also in *Church v. Hilliard,* 221 F. 229, affirmed in 228 F. 1021, the Second Circuit held:

> "When the copyright proprietor of a musical composition sells printed copies of it to the public, the performing rights go with them."

5. One other question in the case was whether or not an establishment was liable for infringement of a public performance for profit if an admission were not charged at the door. The Circuit Court held no infringement unless admission was charged. It was ultimately held, however, by appeal to the Supreme Court of the United States in *Herbert v. Shanley,* 242 U. S. 591 (1917), that it was not necessary that admission be charged at the door in order that the performance within be a public performance for profit, and in that regard only the Circuit Court was reversed. The cases in the District, Circuit, and United States Supreme Courts all held that a certain dramatico-musical composition that was performed in the restaurant had not been reproduced in copy form for sale, and therefore there was an infringement of copyright, of course, if an infringement could take place without an admission being charged at the door. The Supreme Court of the United States held that the infringement could take place even though an admission was not charged at the door. In that regard the High Court reversed the United States Circuit Court of Appeals for the Second Circuit. But in doing so the High Court said, speaking through Justice Holmes in 1917,

> " * * * There is a copyright for the opera and also one for the song which is published and sold

separately. This the Shanley Company caused to be sung by professional singers upon a stage in its restaurant on Broadway accompanied by an orchestra. The district court after holding that by the separate publication the plaintiff's rights were limited to those conferred by the separate copyright—a matter that it will not be necessary to discuss—followed the decisions in 136 C. C. A. 639, 221 Fed. 229, as to public performance for profit. 222 Fed. 344. The decree was affirmed by the Circuit Court of appeals, 134 C. C. A. 460, 229 Fed. 340."

6. Under this stage of court records, petitioners maintain that there was a conflict actually between the Fourth Circuit and the Second Circuit. Now there is a conflict in law with the Eighth Circuit. The Eighth Circuit is in conflict even with the Fourth Circuit, even though it arrived at the same conclusion. The error in the Eighth Circuit is that it placed in its opinion in the cases at bar the exact language of the copyright text, but it cited the decision of the Fourth Circuit from South Carolina and then *Herbert v. Shanley* to support the reasoning. This cannot logically be accepted in law. Under such circumstances, certiorari should be allowed.

7. The importance of a proper construction of the true text of the National Copyright Act, petitioners respectfully submit, is a matter of national importance. When the above-cited case from Nebraska was before the Supreme Court of the United States in 1941, the income from these claimed rights was about six million dollars per year (33 F. Supp. 377). It no doubt has increased. The number of music publishers holding public performance rights was 125 in 1941, while in the

cases at bar the record shows the number had grown to 369 in 1945. The composers have grown from 1200 to 2289 (R. 298-9) in the same period. These alleged rights were enforced by infringement suits, as many as approximately 80 in the various district courts of Nebraska alone, in the ten years immediately preceding the enactment of the Nebraska statute (R. 286). Throughout the United States on that basis there would be many thousands of infringement suits pending to force a business establishment to take out a license to keep from liability for infringement, even though musicians had been engaged to play musical compositions upon the premises and had their own music or played mostly "by ear."

8. The protection that the music users of America have under the National Copyright Act would be destroyed, and by court decision no state law could effectively be passed to protect its citizens, if the Eighth Circuit Court's opinion is allowed to stand.

9. An unlimited and uncontrolled price must be paid to respondents by all who must have music renditions commercially on their premises, or go out of business (33 F. Supp. 377). This is contrary to the intention of Congress in granting the copyright privilege and contrary to the National Copyright Act itself.

10. The police power of a state extends to proper regulation of the use that may be made within the state of any article brought therein for the purpose of sale. The National Copyright Act is not violated when the originators or manufacturers or publishers of such items are required by state law to collect their prices at the

time of sale as required by the Nebraska statute (br. apdx. 4-6).

11. In *Marsh v. Buck,* 313 U. S. 406, and the companion case, the High Court considered this identical state law and the identical section.

12. If regulatory features applicable to the individual publisher, as in Sections 2A and B of the act (br. apdx. 4-6), must be enacted in order to reach the monopolistic vice, then it would seem that the whole Nebraska act, including said sections, did constitute a complete scheme for regulating the public performance for profit monopolistic practices, as might well be inferred from the opinion in *Marsh v. Buck,* 313 U. S. 406 (1941).

IV.

1. Certiorari should be allowed because the trial court found, and the Circuit Court affirmed, the proposition advanced by respondents that certain wording placed on the reproduced copies for sale gave notice to the purchaser that the public performance rights were reserved. The publisher-respondents added to the statutory copyright notice the words, "All rights reserved including public performance for profit." The statement appears on each musical number. By that wording the Circuit Court, in effect, held that the copyright privileges were enlarged. That cannot be done. Those words were legally ineffective as reservations of the right to sing and play the music purchased. The Second Circuit Court of Appeals in 1940 passed upon the legal effect of just such notices on copyrighted material and that which was

not copyrighted. The court held that in reference to the material with the notice attached but not copyrighted, it was ineffecive legally to change the common law dedication to the public when reproduced in copy form for sale and sold. The wording on the copyrighted material could not enlarge the scope of the copyright as defined by statute. Certiorari was denied in the case. (*R. C. A. Mfg. Co. v. Whiteman* (2 C. C. A. 1940), 114 F. 2d 86.)

2. In the event certiorari is allowed, all circuit courts of appeal except the Eighth Circuit will be shown to have held in both copyright and patent matters that the reservation of a right is inimical to the long established principles of unrestricted use in the alienation of property.

3. Some such cases to be analyzed for the Court to prove the petitioners' point of law will be *Straus v. Victor Talking Machine Co.* (1917), 243 U. S. 490; *Bobbs-Merrill Pub. Co. v. Straus,* 210 U. S. 339; *Caliga v. Inter Ocean Newspaper Co.* (1909), 215 U. S. 182; *Univis Lens Co. v. U. S.* (1942), 316 U. S. 241. Also the petitioners will demonstrate the applicability to the United States Supreme Court of the method of protection to the proprietor if he wishes to withhold uses and rights in his copyright as provided by the rules which must be followed. (1945 pocket supplement, pp. 110-11 of 17 U. S. C. A., Sec. 201.1, 201.6(f), 201.7(b), and 201.8; also Sec. 201.12 showing choice of copyright privileges offered to the proprietor—"E. New musical compositions published for first time," "E2 Musical compositions not reproduced for sale;" Secs. 11 and 12, National Copyright Act.)

4. Furthermore, it will be shown that Section 41 of the National Copyright Act (br. apdx. 23) was cited by the trial court and affirmed by the Circuit Court in the cases at bar as a statute conferring the right to withhold or restrict the use or price of the copyrighted material after sale. Congress said in its report concerning said Section 41 exactly the opposite:

> "* * * Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale." (br. apdx. 32)

5. Section 41 was enacted without change as recommended by the committee. It would seem, therefore, that unless the United States Supreme Court allows the writ and reviews the decision and reverses the Eighth Circuit in these cases at bar, a rule of law will stand in the Eighth Circuit permitting a copyright proprietor to sell his wares by affixing a notice of terms and restrictions for use contrary to the Second Circuit and, as petitioners believe, in conflict with the spirit of decisions of the United States Supreme Court in similar matters.

V.

1. The Eighth Circuit Court of Appeals committed error, and certiorari should be allowed, because by that error the United States Circuit Court of Appeals held that the Nebraska statute Sections 2A and B, intended to apply to the respondents (br. apdx. 4-6), actually would have no application because the subject matter in said statute was sheet music and orchestrations moving

in interstate commerce. Such position is untenable, as the facts in the record show that this merchandise was purchased from salesmen who called upon the music stores in Nebraska and sold from catalogs, or the music stores in Nebraska wrote to the respondent publishers in New York and ordered musical compositions. These were bought and paid for by the music stores, placed on their shelves, and sold in the due course of business at retail prices fixed on the sheets of music and orchestrations by the publishers. Musicians were given a 10% discount from the usual sales price when they purchased the music from the music store. Ordinarily, the price for an ordinary musical composition was thirty-five cents for sheet music and seventy-five cents for orchestrations. All that money went into the coffers of the local music stores in Nebraska, and the purchasers obviously became the owners of that which they had purchased for all uses. The musicians bought the music for the purpose of playing it in public for profit, and it was in form for that purpose when and as sold. A great many thousands of pieces are sold annually. (Witnesses Martha Marchant, R. 248; Gladys M. Follmer, R. 250; Julia Morse, R. 252; Eddie Sheffert, R. 258; Dave Haun, R. 260; Paul Moorhead, R. 268; Arthur Randall, R. 270; Deb Lyon, R. 282; Joseph Malec, R. 284.)

2. Within that purchase price was included a royalty, usually of three cents on the sheet music and five cents or more on the orchestrations. By contract existing between the composer and the publisher, this royalty was equally divided between them. Also there were many other royalties and compensations to the composer and

publisher on the copyrighted musical compositions, such as stage rights, motion picture rights, phonograph rights, all of which were a matter of contract between the manufacturers or producers and the publisher on one side and between the publisher and the composer on the other. (See contracts between songwriter and publisher, R. 155, 165; contracts with ASCAP, R. 172, 177, 229.)

3. In the bulletin issued by the Department of Commerce for the United States Government for 1944, under the heading of musical compositions for that year 24 million copies were listed as sold to the public. Consequently, the business is a substantial one. Under the Nebraska statute, for such copies that were sold in Nebraska, compliance with the Nebraska statute would have required the publisher to increase his price in the State of Nebraska to cover any additional charges before sale. The publishers had fixed the price of thirty-five to seventy-five cents, and the same was stamped on the sheets of music, so that a compliance with the Nebraska statute would have been a simple matter. If throughout the United States twenty-five cents had been added to the price of each number sold and if 24 million copies of all copyrighted musical compositions had been sold in one year, six million dollars would have gone directly to the composer and publisher entitled thereto.

4. Thus the plan of the Nebraska statute was to do away with confusion and to place into the hands of the proper composer and the proper publisher whatever pay he desired for the uses to be made of the copyrighted material after sale. The Nebraska statute is, therefore,

in keeping as a matter of fact with the National Copyright Act, Section 1e above discussed, rather than being in conflict with it. Congress did not preempt the field of legislation on this matter. Therefore, the Eighth Circuit, in refusing to recognize the applicability of the Nebraska statute and in affirming the trial court's decision on the invalidity of the act, committed error, and certiorari should be allowed.

5. The petitioners, upon a review by the Supreme Court of the United States, will be able to show by the record more specifically that the singing and playing of a musical composition within the State of Nebraska through the agency of a human being, even from a sheet of music that came into the state by interstate commerce, is not governed exclusively by federal law.

6. The Eighth Circuit is in conflict with a decision in this regard of a three-judge federal court consisting of Circuit Judges Sanborn and Thomas and District Judge Sullivan (*Paramount Pictures v. Langer,* U. S. D. C. N. D. 1938, 23 F. Supp. 890). In that case a North Dakota statute was under attack as invalid, for the reason that its provisions interfered with interstate commerce, the National Copyright Act, and the Constitution of the United States in various particulars. The North Dakota act was passed by its legislature prohibiting a motion picture producer from owning or controlling a theater in the state of North Dakota in which that producer's films were exhibited. The defense was that the films came into North Dakota by interstate commerce and that they were all copyrighted and, in addition, contained

copyrighted material in the songs, scenarios, and so on. Nevertheless, in a very sound opinion that three-judge federal court within the Eighth Circuit held that the defense of interstate commerce and the National Copyright Act was of no avail and that the North Dakota act was in no way in conflict with either, nor with the Constitution of the United States.

7. There are many other cases of similar purport, as to both results and reasoning.

8. Certiorari should be allowed in order to eliminate a decision of the Eighth Circuit Court of Appeals in the cases at bar that denies a state its police power over the use of material sent into the state and sold within the state simply because said material was manufactured, produced, or published in an adjoining state, and even though it was purchased and became a part of the stock of merchandise owned by the Nebraska music dealer.

PRAYER

Wherefore, the petitioners, Interstate Hotel company of Nebraska, Peony Park, and Lloyd G. Fox, pray that the Supreme Court of the United States will allow writs of certiorari to issue to the United States Circuit Court of Appeals for the Eighth Circuit directing that court to certify and deliver to the Clerk of the Supreme Court of the United States the consolidated records in the cases set forth in the caption hereof, to wit, Interstate Hotel Company of Nebraska v. Remick Music Corporation, No. 13162; Peony Park v. M. Witmark & Sons, No. 13163; Lloyd G. Fox v. Chappell & Co., Inc., No. 13164; and

Interstate Hotel Company of Nebraska v. Jerome Kern and T. B. Harms Company, No. 13165; that these cases be consolidated for review before the Supreme Court of the United States; that upon a hearing, said opinion of the said United States Circuit Court of Appeals for the Eighth Circuit, rendered on October 23, 1946, wherein the judgments of the United States District Court for the District of Nebraska in said cases were affirmed, be reversed and said judgments vacated; that in the opinion of the Supreme Court of the United States, the claims and points of law of the petitioners which will be set forth in their brief and by further proceedings in this Court and in accordance with this petition for writ of certiorari, be announced and established in lieu of the opinion and decision of the United States Circuit Court of Appeals for the Eighth Circuit in these cases. The petitioners further pray for such other and additional relief as the Court may deem just and equitable in the premises, and that the respondents be required in the mandate of this Court to pay such costs, expenses, and attorney fees as may be proper in the premises.

Respectfully,

WILLIAM J. HOTZ,

HOTZ & HOTZ,

1530-5 City National Bank Bldg.,
Omaha, Nebraska

Attorneys for Petitioners.

The undersigned, as attorney for petitioners, by attaching his signature to this petition for writ of cer-

tiorari, certifies to the best of his knowledge and belief to the correctness of the matters herein set forth and to the good faith request of petitioners for the allowance of the writ of certiorari as prayed. Accordingly, by his signature the undersigned enters his appearance for the petitioners in the Supreme Court of the United States.

Done at Omaha, Nebraska, this 5th day of December, 1946.

William J. Hotz

The undersigned, one of the attorneys of record for the respondents in the above-entitled cases, does hereby acknowledge receipt of copy of the foregoing petition for writ of certiorari and a copy of the record as certified by the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Done at Omaha, Nebraska, this 6th day of December, 1946.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Sections 1a and 1e of the National Copyright Act (17 U. S. C. A., br. apdx. 16), when applied to the respondent-publishing houses, deprive them of copyright privileges for infringement of musical compositions, be-

cause the respondents had elected to reproduce the musical compositions in copy form for sale and sell them generally to the public rather than withhold the public performance rights unto themselves by foregoing the reproduction in copy form for sale to the public.

Aldrich v. Remington Rand, Inc. (D. C. Tex., 1942), 52 F. Supp. 732.

Bobbs-Merrill Pub. Co. v. Straus (1908), 210 U. S. 339, 28 S. Ct. 722.

Isaac H. Caliga v. Inter Ocean Newspaper Co. (1909), 215 U. S. 182, 30 S. Ct. 38.

John Church Co. v. Hilliard (U. S. D. C. N. Y. 1915), 221 F. 229, 136 C. C. A. 639.

John Church Co. v. Hilliard, 242 U. S. 591, 37 S. Ct. 232 (Jan. 1917).

Herbert v. Shanley (U. S. D. C. N. Y. 1915), 222 F. 344.

Herbert v. Shanley (2 C. C. A. 1916), 229 F. 340, 134 C. C. A. 460.

Herbert v. Shanley, 242 U. S. 591, 37 S. Ct. 232 (Jan. 1917).

RCA Mfg. Co. v. Whiteman (2 C. C. A. 1940), 114 F. 2d 86. Certiorari denied.

Straus v. Victor Talking Mach. Co. (1917), 243 U. S. 490, 37 S. Ct. 412.

National Copyright Act (br. apdx. 16-23), March 4, 1909, c. 320, Sec. 1, 64, 35 Stat. 1075, 1088. Sections 1(a), (b), (c), (d), (e); 2; 5; 9; 11; 12; 25; 34; 35; 40.

Rules and Regulations, Registration of Claims to Copyright, 37 Code of Federal Regulations, Ch. II as amended. 17 U. S. C. A., 1945 P. Pts., p.

107, Sec. 201.1; p. 110, Sec. 201.6; p. 110, Sec. 201.7; p. 111, Sec. 201.8; p. 112, Sec. 201.12.

Federal Copyright Acts from 1790 to 1909 and to date. (Taken from *Copyright Enactments of the United States,* 1783-1906—and to date. Compiled by Thorwald Salberg, Register of Copyrights; Bulletin No. 3, Second Revised Edition.) Br. apdx. 55.

Committee Report No. 2222 on Bill Enacting Copyright Act of 1909, 60th Congress, Second Session; to Amend and Consolidate the Acts Respecting Copyright. (Entire report found in *The Copyright Law;* Herbert A. Howell, recently Assistant Register of Copyrights; the Bureau of National Affairs, Inc., Washington, D. C., 1942) Br. apdx. 24-32.

II.

In order for the cases cited by respondents to the United States Circuit Court of Appeals for the Eighth Circuit to be binding as precedents, there must be an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties.

Hubbell v. Pastime Amusement Co. (U. S. D. C. N. Y. 1917), 242 F. 1002.

Mutual Benefit Health and Accident Assn. v. Bowman (8 C. C. A., 1938), 99 F. 2d 856 (Syl. 3 and 4 and cases cited).

Witmark & Sons v. Pastime Amusement Co. (U. S. D. C. S. C. 1924), 298 F. 470. Section 1e of the Copyright Act quoted at p. 477.

Witmark & Sons v. Pastime Amusement Co., 2 F. 2d 1020.

III.

The United States Circuit Court of Appeals for the Eighth Circuit committed reversible error when it relied upon Section 41 of the National Copyright Act as giving the right to a copyright proprietor to sell his copyrighted material and yet retain a control over the use for which it was intended.

Bobbs-Merrill Pub. Co. v. Snellenberg (C. Ct. Pa., 1904), 131 F. 530.

Bobbs-Merrill Pub. Co. v. Straus (1908), 210 U. S. 339, 28 S. Ct. 722.

Davenport-Quigley Expedition v. Century Production Co., (U. S. D. C. N. Y. 1937), 18 F. Supp. 974.

National Geographic v. Classified Geographic (D. C. Mass., 1939), 27 F. Supp. 655.

Patterson v. Ogilvie Pub. Co. (C. Ct. N. Y., 1902), 119 F. 451.

RCA Mfg. Co. v. Whiteman, 114 F. 2d 86. Certiorari denied.

Stevens v. Cady (R. I.), 14 How. 528, 14 L. Ed. 528.

Stevens v. Gadding, 17 How. 477, 15 L. Ed. 155.

Straus v. American Publishers Assn. (1913), 231 U. S. 222, 34 S. Ct. 84.

Univis Lens Co. v. U. S. (1942), 316 U. S. 241, 62 S. Ct. 1088.

Title 17 U. S. C. A., Sec. 41, 35 Stat. 1084 (br. apdx. 16).

Committee Report No. 2222 on Bill Enacting the Copyright Act of 1909. Section 41 (br. apdx. 32).

IV.

It falls within the police power of a state to enact reasonable regulations in reference to the public performance rights on music that is sold at the music stores in the state. The Nebraska statute (R. S. N. 1943, Sec. 59-1303-1304-1306; br. apdx. 4-6) is such reasonable regulation. For the federal court to strike it down constitutes reversible error.

Allen v. Riley (1906), 203 U. S. 347, 27 S. Ct. 95, and cases therein cited.

Buck v. Gallagher (D. C. Wash., 1940, before Haney, C. J., Bowen and Black, D. J.), 36 F. Supp. 405.

Buck v. Gibbs (D. C. Fla., 1940, before Hutcheson, C. J., Long and Barker, D. J.), 34 F. Supp. 510.

Buck v. Swanson (D. C. Neb., 1939, before Gardner, C. J., Munger and Donohoe, D. J. Findings of fact and conclusions of law not reported; copied in br. apdx. with opinion, p. 42-52), 33 F. Supp. 377.

Marsh v. Buck (May 27, 1941), 313 U. S. 406, 61 S. Ct. 969.

Paramount Pictures v. Langer (U. S. D. C. N. D. 1938, before Sanborn and Thomas, C. J., Sullivan, D. J., and cases therein cited), 23 F. Supp. 890.

Straus v. American Publishers Assn. (1913), 231 U. S. 222, 34 S. Ct. 84.

Watson v. Buck (May 27, 1941; concurrently decided with *Marsh v. Buck* as basic opinion), 313 U. S. 387, 61 S. Ct. 962.

Nebraska Act (br. apdx. 1-15).

V.

Copyright privileges may be denied to copyright proprietors who abuse the privileges. The alignment of copyright proprietors as officers and directors of an unlawful organization dealing in public performance rights, their refusal to deal in accordance with the laws of a state, and their attempts to destroy state statutes, constitute reasons for denial to such copyright proprietors of the petition of infringement. Neither the Nebraska state law nor the federal law makes any distinction for unlawful conduct as between the organization itself and the officers, directors, and members thereof.

Nebraska Cases

Bridgeport I. D. v. U. S. (8 C. C. A., 1930), 40 F. 2d 827.

Howell v. State (1909), 83 Neb. 448, 120 N. W. 139.

Johnson v. J. H. Yost Lumber Co. (1941), 117 F. 2d 53.

Marsh-Burke v. Yost (1915), 98 Neb. 523, 153 N. W. 573.

State v. Adams Lumber Co. (1908), 81 Neb. 392, 116 N. W. 302.

State v. American Surety Co. (1912), 91 Neb. 22, 135 N. W. 365.

State v. Nebraska Distilling Co. (1890), 29 Neb. 700, 26 N. W. 155.

State v. Omaha Elevator Co. (1906), 75 Neb. 637, 655, 106 N. W. 979, 110 N. W. 874.

State v. Standard Oil Co. (1900), 61 Neb. 28, 84 N. W. 413.

Younglaus v. Omaha Film Board of Trade (1932), 60 F. 2d 538.

Nebraska Statutes relating to monopolies, unfair practices, boycotting, etc. (R. S. N. 1943, Ch. 59).

Federal Court Cases

American Press Assn. v. U. S. (1945), 326 U. S. 1, 65 S. Ct. 1416.

Eastern New York Savings Bank v. Hahn (1946), ... U. S. ....., 66 S. Ct. 69.

Fashion Originators Guild v. F. T. C. (1941), 312 U. S. 457, 61 S. Ct. 703.

Fox Film Corp. v. Doyal (1932), 286 U. S. 123, 52 S. Ct. 546.

General Electric v. Hygrade Sylvania Corp. (U. S. D. C. N. Y. 1942), 45 F. Supp. 714.

Interstate Circuit, Inc. v. U. S. (1939), 306 U. S. 208, 59 S. Ct. 467.

Morton Salt Co. v. Suppiger (1942), 314 U. S. 488, 62 S. Ct. 402.

Paramount Famous Lasky, et al. v. U. S. (1930), 282 U. S. 30, 51 S. Ct. 42.

U. S. First National Pictures (1930), 282 U. S. 44, 51 S. Ct. 45.

30 C. J. S., Maxims, Sec. 89, p. 458—Public Policy.

VI.

Where the National Copyright Act specifically sets forth a statutory penalty of $10.00 for each infringement of a copyrighted musical composition, and where the language is clear and unambiguous and the report of the committee of the National Congress on the matter

specifically refused to place within the act a statutory penalty of $250.00, it is reversible error for an appellate court to award $250.00 for each infringement instead of $10.00 as the statutory award.

Title 17 U. S. C. A., Sec. 25 Fourth (br. apdx. 21-2).

Title 17 U. S. C. A., Sec. 40 (br. apdx. 23).

Congressional Committee Report No. 2222 (br. apdx. 32).

STATEMENT OF POINTS TO BE RELIED UPON FOR REVERSAL IN THE EVENT CERTIORARI IS ALLOWED

I.

Did the United States Circuit Court of Appeals for the Eighth Circuit, as a matter of law, commit reversible error by affirming the decision of the trial court and by granting respondents' prayer for damages and for injunction for infringement when it appears by the record in the cases

(a) That the Nebraska statute pleaded in defense (R. S. N. 1943, Ch. 59; br. apdx. 1-15) had been declared in 1941 by the Supreme Court of the United States a valid exercise of the state police power and was held to constitute a complete scheme for the regulation of unlawful combinations controlling public performance rights of copyrighted musical compositions?

(b) That each respondent was a member of ASCAP, and that its plan of operation was held by the Supreme

Court of the United States to fall squarely within the prohibitions of the state statute?

(c) That the Supreme Court of the United States had refused to declare Sections 1303-1306 (R. S. N. 1943) of said act invalid and in conflict with the National Copyright Act (br. apdx. 4-6) or any part of the Constitution of the United States, when that issue on those sections was presented to said Court by ASCAP and its members, which included the respondents?

(d) That each respondent by its amended complaint admitted that it had not complied with any section of the Nebraska statute?

(e) That neither the National Congress by the National Copyright Act nor the federal Constitution preempted the field of the state's rights to reasonably regulate and control the sale and use of copyrighted material within a state, whether owned or controlled by an unlawful combination or by individuals acting independently thereof?

II.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by refusing to hold petitioners free from liability for infringement as a matter of law under the provisions of the National Copyright Act (br. apdx. 16-23) in reference to public performance rights on copyrighted musical compositions, when it appeared that the musical numbers in question had been reproduced and published by respondents in copy form for sale and sold by them to the public gen-

erally, including Nebraska, for the obvious use of public performance for profit, and when the form in which the compositions were published for sale was adaptable for such use by the purchasing musicians?

III.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by affirming the trial court's decision that the petitioners' defense of unclean hands was not applicable as a matter of law, when it appeared

(a) That the respondents herein adhered as members to the ASCAP organization; that the officers or directors of respondents were officers or directors of ASCAP?

(b) That all the six musical compositions in question at the time of the alleged infringements bore the letters "ASCAP" and the seal of the American Society of Composers, Authors, and Publishers, and that this marking indicated public performance ownership rights in ASCAP?

(c) That each of the respondents as a member of ASCAP, and ASCAP itself, within a short period previous to the dates of the infringement suits, had been held criminally liable in a federal court for a violation of the terms of the Sherman Anti-Trust Act by dealing in public performance rights for profit as a combination in conjunction with the respondents as music publishers and with composers under its plan of operation? (*U. S.*

v. ASCAP, et al., Crim. O. 449, U. S. D. C. E. D. Wis., br. apdx. 53-4.)

(d) That the Nebraska statute (br. apdx. 1-15) in regard to prohibiting combinations and their members from dealing within the state, was in all respects similar to the Sherman Anti-Trust Act in reference to interstate transactions?

(e) That the respondents elected to boycott Nebraska users, including petitioners, by asserting in their amended complaints that they had not sold and would not sell their musical compositions in Nebraska?

(f) That respondents and other publisher-members of ASCAP had in the State of Nebraska, within ten years previous to the enactment of the 1937 state act, instituted approximately 79 infringement suits against Nebraska users to enforce ASCAP licenses for public performance rights, when it appeared that the respondents herein had assigned these rights exclusively to ASCAP, well knowing that said assignment would produce a result that would be in restraint of trade and against public policy and the laws of the State of Nebraska?

(g) That the same custom was being carried out by the respondents when they instituted the infringement suits at bar en masse to force petitioners to deal with respondents as an organization or be sued for infringement, contrary to the method provided by the Nebraska statute?

(h) That the Articles of Association of ASCAP provide that all license money obtained for public per-

formance, even if collected by individual members such as the respondents, must be paid into the ASCAP treasury for general distribution to all its members?

(i) That a reassignment by ASCAP to respondents of the public performance rights for Nebraska prior to suit failed to alter respondents' membership status in ASCAP or their financial interests therein or their contractual relationship, evidenced by their general contracts and the provisions of the Articles of Association?

(j) That each petitioner was a proprietor of an establishment which required the rendition of music in the operation of its business; that none were musicians; that the musicians engaged were professionals who made their own selections of musical compositions and rendered them with their own varying interpretations; that a contract or admonition by the petitioners to the musicians to play other than respondents' music might be ineffective to save the petitioners from confiscatory liability for infringement?

(k) That petitioners had acted in good faith and relied upon the previous decisions of the Supreme Court of the United States and the Nebraska statute, as did the musicians engaged by petitioners?

IV.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by affirming the judgments of the trial court, when it appeared from the record

(a) That the principal objective of all the infringement suits brought by the respondents was not in good faith to collect damages for infringement, but to force the repeal of the entire state act and again permit ASCAP to do business in the state rather than comply with the statutory regulations relating to pay for the individual copyright proprietors directly instead of through the combination declared unlawful?

(b) That the decision of the trial court holding the four sections (R. S. N. 1943, 59-1303-1306; br. apdx. 4-6) relating to individual composers invalid, subjected the music users of the State of Nebraska, including the petitioners, to confiscatory infringement suits; that the repeal of the entire Nebraska law would afford the only relief to Nebraska music users from such infringement suits; that threats of infringement suits and other unethical operations were then being used by ASCAP before the Nebraska legislature then in session to force the repeal of said state act; and that after judgments were entered in the cases at bar, the Nebraska legislature did repeal the state act on April 17, 1945, effective August 10, 1945?

V.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when the record showed the foregoing last mentioned facts in connection with the repeal of said statute, by holding that the repeal of said statute relieved the federal court of the duty to pass upon the validity of the state statute, when the State of Nebraska had a protective saving clause

statute in force at the time of the repeal specifically providing that no repeal of any statute by the legislature of Nebraska shall affect pending actions or causes of action in that state arising while the act was in force and effect and prior to repeal?

VI.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error by affirming the judgments of the trial court assessing $250.00 for each infringement, when the National Copyright Act itself, by clear and unambiguous terms, provides $10.00 for each infringement of a musical composition as the statutory allowance?

VII.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when it affirmed the trial court's allowance of substantial attorney fees as part of the costs in each case, when it appeared that the issues actually tried in the court below by the respondents and the petitioners in all the cases were the constitutionality of the Nebraska statute and the applicability of the National Copyright Act upon new issues presented for the first time since the enactment of the National Copyright Act on March 4, 1909?

VIII.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when it, upon its own volition, adopted a construction, as shown by its

opinion, which would destroy rather than uphold the validity of the state act in all its parts?

IX.

Did the United States Circuit Court of Appeals for the Eighth Circuit commit reversible error when it permitted, in its power of appellate review, the destruction of a state statute, when it appeared that the staute was in no manner in conflict with the National Copyright Act?